IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 77 of 1992

with

CRIMINAL APPEAL No 1126 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE D.P.BUCH sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHOKBHAI RAMANLAL JOGI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 77 of 1992

MR SUNIL C PATEL for Petitioner No. 1 (absent)

MR KP RAVAL, A.P.P. for Respondent No. 1

2. Criminal Appeal No. 1126 of 1991

CORAM : MR.JUSTICE B.J.SHETHNA
and

MR.JUSTICE D.P.BUCH

Date of decision: 26/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. The appellant - accused No.1 was tried, along with 2 other accused Ramanbhai and Revaben, before the Court of Additional Sessions Judge, Valsad at Navsari in Sessions Case No.4 of 1990 for committing murder of deceased Dahyabhai on 25.8.1989 at 12.30 noon. Immediately, after the incident, F.I.R. Ex.37 was lodged by the complainant Kokilaben, widow of deceased Dahyabhai before Pardi Police Station. After lodging of the F.I.R. deceased Dahyabhai died at Surat in Hospital. Therefore, all the accused were tried for the offences punishable u/ss. 302, 323, 326, 114 of Indian Penal Code.

2. After appreciating the evidence of the prosecution witnesses and the defence of the accused the learned Judge by his impugned Judgment and order dated 30.11.1991 acquitted the accused No.2 Ramanbhai Bhavsingbhai and accused No.3 Revaben, wife of Ramanbhai Bhavsingbhai by giving benefit of doubt, however, convicted the appellant - accused No.1 Ashok Ramanbhai for the offence punishable u/s.302 I.P.C. and sentenced him to suffer Life Imprisonment and to pay a fine of Rs.500/- and indefault to further under-go 6 months R.I. The accused was in jail and therefore set-off was given u/s.428 Cr.P.C. This order of conviction and sentence passed by the learned Additional Sessions Judge is challenged in this Appeal by the present appellant - accused.

3. It is unfortunate that in this Appeal of 1992, which was listed at Sr.No.2 of Final Hearing Board today before this Court, learned Counsel appearing for the appellant was not present when it was called out after recess. The appellant - accused was in Jail since 25.8.1989 as under-trial prisoner and after conviction also he remained in Jail because even after admission of his Appeal the bail was refused. Thus, by now he has already remained in jail for more than 11 years. Under the circumstances, with the aid and assistance of Shri Raval, learned A.P.P. this matter is heard and decided on merits in absence of the learned Counsel for the appellant.

4. In the instant case it is alleged that the incident in question took place on 25.8.1989 in a

broad-day light hours at 12.00 noon at village Bhesla Pada, Pardi. Kokilaben widow of deceased Dahyabhai, PW 3, Ex.36, lodged the F.I.R. before the Pardi Police Station for the offences u/ss. 326, 323, 114, 504 I.P.Code within 45 minutes of the incident, at 1.15 p.m. It was her case in F.I.R. that 3 months before the incident there was quarrel between her husband and accused Raman Bhavsing and his son Ashok on trivial matter. For that the case was filed against her husband. Because of the Court's date both, father and son, got excited and started giving abuses to her husband and since then they had enmity.

It is further stated that her maternal Aunt Vasanti @ Babli is also staying in the same street. She love married with Bhaiya. Therefore, Raman Bhavsing and others boycotted them and declared that if anybody keep relation with then then he will have to pay fine of Rs.1000/- and therefore she was not going to the place of Babli. Because of the earlier incident they have boycotted Vasanti.

It is further the case of Kokilaben that for the betterment of their business Jogi people sacrifies goat every year. Accordingly, they sacrified one goat on that day and serving mutton of the goat to the people of the street. Her husband deceased Dahyabhai Babubhai was serving the mutton to the people, who gathered there. While serving the mutton the accused No.1 - Ashok (present appellant) found something wrong with him. He started abuses and beating her husband. Thereupon, accused No.2 Raman Bhavsing and his wife accused No.3 Revaben, both joined beating her husband. She had gone there with food, therefore she saw the accused beating her husband. Thereupon she raised shouts and went near her husband. Because of that accused No.1 Ashok gave knife blow on the stomach of her husband deceased Dahyabhai. Because of the scuffle with her husband accused Ramanbhai Bhavsing also received knife injury on his cheek. At that time Kishan Babu, Babu Soma, Kiku Dahya, Thakor Shanker, Kishan Babu, Madhuben and others came there and saved her husband from further beating and because of the injury received by her husband they immediately took him to the Hospital.

It is surprising that though her husband Dahyabhai Babubhai was alive at that time the offence u/s.302 I.P.Code was registered along with Sections 323, 326, 114, 504 I.P.Code.

5. To prove its case the prosecution had examined 3

Eye witnesses i.e. (i) Kokilaben Dahyabhai, widow of deceased Dahyabhai, P.W.3, Ex.36, (ii) Babubhai Somabhai, real maternal uncle of deceased Dahyabhai, P.W.5, Ex.41, and (iii) Galabhai Thakorbhai, real brother of Kokilaben, P.W.9, Ex.49.

6. Complainant Kokilaben, P.W.3, Ex.36, stated in her evidence before the Court that they had no relation with the accused persons. Accused were doing the business of liquor, therefore, there was a raid and because of the raid the accused threw away the cans near her house and ran away. They had no talking terms with the accused because the accused were abusing her husband and also filed case before 2 to 3 months. At the time of incident she had gone with Rotlas at the place of incident. At that time Revaben Ramanbhai, accused No.3 and Madhuben Kishanbhai were there. Accused No.2 Ramanbhai Bhavsingbhai told her husband that she had brought food and therefore if the mutton is ready then it may be served, but her husband did not serve it and state that still the mutton is being cooked. Thereupon, accused Ramanbhai told her husband that he had come with food and therefore if the mutton is ready it may be served, but her husband did not serve it by saying that the mutton is not ready. Thereupon accused No.2 Raman Bhavsing started giving abuses and the deceased and accused No.2 were exchanging the words against each other. At that time all of a sudden accused No.1 Ashok Raman - present appellant came with knife and gave blow at chest and stomach of her husband. Thereupon she started raising shouts. Before the knife blow was given altercation took place between her husband and accused Ramanbhai and Revaben. Hearing the shouts, Babu Soma, Kiku Dahya, Thakor Shanker, Kishan Babu, Madhuben Kishanbhai came there. Accused Ramanbhai Bhavsing, while trying to intervene, received knife injury on his chick, used by accused No.1 Ashok. Thereafter her husband was removed to the hospital by Babu Soma, Kishan Babu, Thakor Shanker, Chhagan Shanker and she went to Pardi Police Station and lodged F.I.R., which is at Ex.37.

However, in her cross examination she has admitted that the accused are related to them and they are their family members. She refused the suggestion that her husband was brought up by the accused. She also denied that on such occasion of feast the ladies do not go there. She has stated that scuffle ( ) continued for about 30 to 45 minutes and during this period the quarrel was going on between her husband and the accused. During that period about 4 to 5 persons from their side were present. All throughout they were

tried to separate them, at that time all of a sudden accused Ashok came with knife and gave knife blows to the deceased.

However, she has admitted in her cross examination that she had neither stated in F.I.R. nor in her Further Statement before the Police that the accused are doing the business of selling liquor and there was a raid at their place. She has also admitted that she has not stated in her statement before the Police that accused Ramanbhai told her husband that he had brought food. She has also admitted that that she has not stated in her statement before the Police that Ramanbhai Bhavsingbhai gave filthy abuses to her husband. She has also admitted in her further statement that she has not stated that Ashok gave one blow of knife on the chest and while intervening accused Ramanbhai received the knife injury from Ashok. She has stated in her cross examination that at the time of incident accused Ashok had put on cloths on his body. She has denied that she has stated in her further statement the fact which has not been stated in her F.I.R. However, she had to admit that the accused Ashok gave only one knife blow on the stomach of her deceased husband.

7. Another Eye witness Babubhai, P.W. 5, Ex.41, has more or less corroborated the evidence of Kokilaben. However, according to Babubhai, the accused Ramanbhai and Revaben caught hold of deceased and at that time all of a sudden accused Ashok came with knife and gave two knife blows. Because of the shouts the people ran away to caught hold of accused Ashok who was hurling the knife in the air and because of that his father accused Ramanbhai received knife injury on his chick. Thereafter, they caught hold Ashok Ramanbhai there and there. He advised brother in law of Dahyabhai to remove him to the hospital and advised Kokilaben, wife of the deceased to immediately go to the police station and lodged the complaint. However, Dahyabhai died on the way before they reached to the hospital. He is also closely related to the deceased. He is the real maternal uncle of the deceased. He has admitted in his cross examination that he has not stated before the police in his statement that accused Ramanbhai and Revaben were abusing the deceased. He has also admitted that he has not stated in his statement before the police that accused Ramanbhai Bhavsingbhai and Revaben caught hold of deceased. He has stated in his cross examination that at the time of incident accused Ashok had put on "T-Shirt".

8. The third eye witness Galabhai, P.W.9, Ex.49, is

the real brother of Kokilaben, complainant. He came out with totally a different story before the Court. According to him mutton was not fully cooked and because of that Ramanbhai and Revaben started giving fist blow to the deceased Dahyabhai. At that time all of a sudden accused Ashok came with knife and gave two knife blows to deceased Dahyabhai. Others have seen it and therefore Ashok caught raid handed there and there, but Raman Bhavsing ran away. He also tried to explain the injury received by accused Raman Bhavsing by saying that while Ashok was hurling the knife in air Raman received the knife injury on his cheek.

In his cross examination Galabhai admitted that at least 10 to 12 persons were present at the time of incident. According to him the incident lasted for about 30 to 45 minutes. For first 15 minutes the accused Ramanbhai Bhavsing and Revaben continuously gave beating to his brother in law deceased Dahyabhai by giving kick and fist block on different part of the body and after 10 to 15 minutes Ashok, who was present there sitting nearby, came all of a sudden and gave 2 knife blows to the deceased, one on chest and one on stomach.

9. It was not the case of even the complainant Kokilaben in her F.I.R. that accused Nos.2 & 3 caught-hold of her husband Dahyabhai at the time of incident when the accused No.1 Ashok gave knife blow. Therefore, learned Judge did not rely upon the prosecution evidence on that point and gave benefit of doubt to the accused Nos.2 & 3. However, the learned Judge, relying upon the evidence of the aforesaid 3 witnesses, came to the conclusion that the prosecution has proved its case against the Appellant - accused No.3 Ashok for the offence u/s.302 I.P.Code and therefore sentenced him to suffer life imprisonment.

10. Having carefully considered the evidence of all the 3 prosecution witnesses we are of the considered opinion that the real version at the time of incident is not coming forward. All the 3 witnesses have tried to explain the injury received by the accused No.2 Raman Bhavsing by saying that accused No.1 Ashok was hurling the knife and because of that the accused No.2 received injury on his cheek. The very fact that the quarrel continued for almost 30 to 45 minutes between the deceased and accused Ramanbhai Bhavsing and Revaben shows that from the deceased side also some resistance were there and if the accused No.1 who was sitting quitely by that side for 10 to 15 minutes then all of a sudden he would not take out the knife and gave 2 blows on the

deceased. It is possible that when he saw that his real parents were assaulted by the deceased and other then by way of self defence he might have taken out knife. It is true that he has exceeded the right of self defence, but it was a case of grave and sudden provocation. Considering the fact that admittedly there was previous enmity between the parties it would not be proper for this Court to convict the accused for the offence punishable u/s.302 I.P.Code. In our considered opinion the prosecution has proved its case against the appellant - accused for the offence punishable u/s.304, Part-I I.P.Code and not u/s.302 I.P.Code.

11. Accordingly we partly allow this Appeal and quash and set aside the order of conviction and sentence passed by the learned trial Judge convicting the appellant - accused for the offence punishable u/s.302 I.P.Code and ordered him to suffer Life Imprisonment, and instead of that we hold accused - appellant guilty for the offence punishable u/s.304, Part - I I.P.Code and sentence him to suffer imprisonment for which he has already undergone till date.

From the Judgment of the learned trial Judge it appears that the appellant - accused was hardly 17-1/2 years old and he is in Jail since 1989 i.e. from the date of the incident. Therefore, in our considered opinion it will be sufficient punishment for him to remain in Jail for all this period. Under the circumstances, Shri Raval, learned A.P.P. could not object to the order of sentence, which has already undergone by the appellant - accused, on the peculiar facts and circumstances of this case. Accordingly, while holding the appellant - accused guilty u/s.304, Part-I, I.P.Code, the accused is ordered to under-go imprisonment which he has already undergone. Fine, if paid, shall be refunded to the appellant - accused. If the appellant - accused is not required for any other offence, he may be released forthwith from the Jail.

sd/-
(B.J.Shethna, J.)

Date : November 26, 2001 sd/-
(D. P. Buch, J.)

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